Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LEARIE ARLINGTON DALY,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Morin v. United States*, 80 F.3d 124 (4th Cir. 1996) the Fourth Circuit found a naturalization application to be "the most compelling evidence of permanent allegiance to the United States" that would establish a permanent resident alien as a "national" of the United States, under section 101(a)(22) of the Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(22).

Whether, a three judge panel of the Fourth Circuit Court of Appeals may depart from this earlier interpretation, on the basis of a contextual distinction, and instead adopt and apply the interpretation of the Ninth Circuit Court of Appeals.

2. *Taylor v. United States*, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior conviction qualifies as a predicate for sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of an offense were necessarily adjudicated in the state court.

Whether, where the defendant upon a charge for felony parental child abuse, and common law battery, has entered a guilty plea to common law battery, there is no contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty for common law battery, a court may consider a version of underlying facts found in a document in the court file such as the Application for Statement of Charges/Statement of Probable Cause and, even if the

QUESTIONS PRESENTED – Continued

facts alleged in the document are challenged by the defendant, regard them as sufficiently reliable evidence to determine that the defendant was convicted of a violent version of common law battery that qualifies as "a crime of violence" as defined in section 101(a)(43)(F) of the Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(43)(F).

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

On March 1, 2003, the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the Bureau of Immigration and Customs Enforcement in the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 §§ 2, 101, 331, 442, codified at 6 U.S.C. §§ 101, 111, 251, 252.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Learie Arlington Daly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra., 1-18) is unpublished. The order of the Board of Immigration Appeals (App., infra., 19-25) and the immigration judge's decision (App., infra., 26-36) are also unreported.

JURISDICTION

The decision of the court of appeals was entered on May 2, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(3) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(3), *et seq.* states:

> the term "alien" means any person not a citizen or national of the United States.

2. Section 101(a)(22) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(22) states:

> the term "national of the United States" means
>
> (A) a citizen of the United States

or

(B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

3. Section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii), states in pertinent part as follows:

Any Alien who is convicted of an aggravated felony at any time after admission is deportable.

4. Section 101(a)(43) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101, states in pertinent part as follows:

The term "aggravated felony" means –

(F) crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year.

18 U.S.C. section 16 defines a "Crime of Violence" as

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT

1. Learie Arlington Daly a thirty-four (34) year-old, veteran of Operation Desert Storm, and Operation Desert Shield, in Kuwait, entered the United States on December 18, 1976, at the age of five from Trinidad, and has since resided in Baltimore, Maryland. C.A.R. 001-002.[1] Mr. Daly attended Waverly Elementary School, Chincapin Middle School and Baltimore City College, all in Baltimore, Maryland. Every morning of his public school education, Mr. Daly stood and proudly recited the Pledge of Allegiance before the American Flag. As a young child, Mr. Daly understood the great opportunity and privilege that came with being an American Citizen and thus, Mr. Daly imbibed the culture, spoke the language, ate the food, and indeed, represented that he was American.

a. In utter appreciation of the benefits and opportunities presented by America, Mr. Daly enrolled for service in the U.S. Marines while in high school, which made him a student Marine Corps, albeit on inactive duty, and required that Mr. Daly train at Paris Island, South Carolina, with his recruiter, every other weekend for almost one year. Upon graduation, Mr. Daly formally enlisted in the U.S. Marine Corps and on July 11, 1989, took the oath to support and defend the United States as administered to all service men, under 10 U.S.C. § 502. While on active duty, Mr. Daly began the day every morning by saluting the American Flag and every evening, ended the day similarly. Subsequently, Mr. Daly received formal training

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[1] The joint appendix filed with the Court of Appeals reproducing the Certified Administrative Record is cited herein as "C.A.R. ___."

in the use of land mines detection and sweeping equipments, building roads and bridges.

b. All through his tour of duty, Mr. Daly resided mostly overseas (Japan), and relying on the representation of the military, believed and represented himself as an American. While in active duty, Mr. Daly sustained three permanent injuries, and is a much decorated veteran with awards such as the Rifle Marksman Badge, the National Defense Service Medal, the Sea Service Deployment Ribbon and the Meritorious Unit Commendation. C.A.R. 004. On September 6, 1993, Mr. Daly was honorably discharged from active duty. C.A.R. 004.

2. Mr. Daly married a fellow marine, a U.S. citizen and has three children, all of whom are U.S. Citizens. But upon his return after the discharge, Mr. Daly's marriage, regrettably, like most military marriages, began to unravel, and Mr. Daly became involved in a long and bitter battle for the custody of his children that would culminate in a conviction for Maryland common law battery.

a. On October 4, 1996, Mr. Daly was charged with two counts of misdemeanor common law battery and two counts of felony parental child abuse. MD Art. 27, Sec. 35(b)(1). C.A.R. 005-006. On December 17, 1996, Mr. Daly entered a guilty[2] plea to two counts of misdemeanor common law battery. The two counts of felony child abuse were dismissed, and Mr. Daly was sentenced to six years imprisonment, which were all suspended, and three years supervised probation. C.A.R. 007-008. At the time of the

[2] The plea form in this case indicated that Daly pled "not guilty to an agreed statement of facts," C.A.R. 007-008, which in Maryland is treated as a guilty plea.

conviction that is the subject of this matter, Mr. Daly had been in the United States for more than twenty years and had no prior criminal record.

b. On July 22, 1997, Mr. Daly was rearrested and charged with child abuse, second degree assault and possession of a deadly ~~weapon with~~ intent to injure. C.A.R. 020. On October 27, 1998, the District Court dismissed all the new charges but found that Mr. Daly had violated the terms of his probation, and reimposed the original sentence. C.A.R. 020. Mr. Daly was then incarcerated at the Maryland Department of Corrections to serve out the remainder of his sentence.

3. On May 14, 1999, the Department of Homeland Security (DHS), issued a notice to appear charging Mr. Daly as removable, under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) of the Immigration and Nationality Act (INA or Act), as an alien convicted of an "aggravated felony" as defined in section 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). C.A.R. 021. The removal proceeding was based on Mr. Daly's conviction for Maryland common law battery. Under INA § 101(a)(43)(F), Maryland common law battery is not defined as an "aggravated felony." Rather, "battery is a common law misdemeanor." *Elias v. State*, 661 A.2d 702, 709 (Md. 1995). The "aggravated felony" charge was the only charge contained in the notice to appear and the only asserted basis for Mr. Daly's removal.

a. Mr. Daly filed two motions to terminate the removal proceedings on grounds that common law battery was not an "aggravated felony," under INA § 101(a)(43)(F), and that he is a "national of the United States," as defined by section INA § 1101(a)(22).

b. On March 21, 2001, Mr. Daly filed an application for naturalization as a United States citizen with the DHS,[3] under INA §§ 328 and 329, 8 U.S.C. §§ 1439 and 1440. On July 9, 2001, the DHS denied Mr. Daly's application on the ground that Mr. Daly was an aggravated felon. Mr. Daly requested a hearing on the denial of his application for naturalization, under INA § 336(a), 8 U.S.C. § 1447. Again, the DHS without affording Mr. Daly a hearing denied the petition. C.A.R. 024-029.

c. On June 25, 2002, Mr. Daly filed yet another Motion to Terminate Proceedings with the DHS, on the grounds that common law battery is not a crime of violence, and therefore not an aggravated felony, and that also he was a national of the United States by virtue of various manifestations of allegiance to the United States, under INA § 101(a)(22)(B).

d. On August 1, 2002, the immigration judge relying on INA § 308, 8 U.S.C. § 1408, and in the *Matter of Tuitasi*, 15 I. & N. Dec. 102, 102 (BIA 1974), found Mr. Daly was not a national of the United States. He denied Mr. Daly's Motion, and ordered him removed to Trinidad. *Tuitasi*, however, held that the "acquisition of nationality for a non-citizen national is governed by INA § 101(a)(22), and not INA § 308." C.A.R. 032. And the immigration judge made no attempts to reconcile INA § 308, with INA § 101(a)(22).

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[3] An honorably discharged veteran of the United States armed forces may apply for naturalization during deportation proceedings against him, under INA §§ 328 and 329, 8 U.S.C. §§ 1439 and 1440(b)(1).

4. On August 29, 2002, Mr. Daly filed a timely notice of appeal to the BIA. On March 14, 2003, the BIA remanded the decision, of the immigration judge's decision, with instructions to make a finding as to whether Mr. Daly's misdemeanor convictions for common law battery constituted "a crime of violence," under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), and § 1227(a)(2)(A)(iii). The BIA reserved ruling on the question as to whether Mr. Daly was a "national" of the United States, under INA § 101(a)(22).

a. On June 16, 2003, the immigration judge found that Mr. Daly was an aggravated felon and ordered him removed. The immigration judge reasoned that because common law battery could not be categorically described as a crime of violence in the State of Maryland, he would, under *United States v. Kirksey*, 138 F.3d 120, 125 (4th Cir. 1998), review facts contained in Mr. Daly's Application for Statement of Charges/Statement of Probable Cause to make the determination as to whether Mr. Daly's conviction constituted a "crime of violence," under 18 U.S.C. § 16. Upon conducting this review, the immigration judge noted, elicited and relied on the facts to the effect that "Daly physically struck his four-year old daughter with a belt and buckle resulting in serious facial injury and physically beat his two-year old daughter so severely that the beating resulted in bruising and marks on her buttocks and thighs." C.A.R. 239.

b. On July 3, 2003, Petitioner filed yet another timely appeal with the BIA. Again, Mr. Daly argued that the immigration judge erred in reviewing the Application of Statement of Charges/Statement of Probable Cause in its determination as to whether Mr. Daly's conviction for misdemeanor common law battery was a "crime of

violence," and that he was a "national of the United States." Mr. Daly relied on, amongst other cases, *Lewis v. INS*, 194 F.3d 539, 542 (4th Cir. 1999). In *Lewis*, the Court held that "in deportation proceedings, the immigration judge cannot go beyond the judicial record to determine the guilt or innocence of an alien." *Id.*

c. On February 13, 2004, the BIA affirmed the immigration judge's decision.[4] C.A.R. 235. The BIA relying on *United States v. Kirksey*, 138 F.3d 120 (4th Cir. 1998) reasoned that because "the definition of battery in Maryland leaves unclear whether the conduct encompassed in the crime categorically constitutes the use of physical force against the person of another," it was required to determine whether Mr. Daly's conviction for Maryland common law battery, qualified as "a crime of violence." The BIA further reasoned that *Kirksey* allowed for a review of Mr. Daly's Application for Statement of Charges/Statement of Probable Cause, which "although not technically considered part of the conviction record, may nevertheless be used in determining whether a particular battery offense constituted a crime of violence." C.A.R. 237. And upon review of facts contained in Mr. Daly's Application for Statement of Charges/Statement of Probable Cause, the BIA relied on the same facts that the immigration judge had cited to determine that Mr. Daly had been convicted of a "crime of violence" as defined in 18 U.S.C. § 16.

5. On February 23, 2004, Mr. Daly filed a timely petition for review of the BIA's decision in the Fourth Circuit. Mr. Daly argued, amongst other things, that

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[4] The Board also ruled that Mr. Daly was not a national of the United States.

Morin v. United States, 80 F.3d 124 (4th Cir. 1996) was controlling, and therefore, that he was a "national" of the United States, under INA § 101(a)(22)(B), by virtue of filing an application for naturalization. Mr. Daly also argued that Maryland common law battery is not a crime of violence, and that the BIA erred in reviewing the Application for Statement of Charges/Statement of Probable Cause to determine whether the factual allegations contained therein could support a finding that he had committed a violent version of common law battery such as to constitute a "crime of violence."

a. On May 2, 2005, a divided panel affirmed the BIA's decision. The majority rejected Mr. Daly's argument that *Morin* was controlling, reasoning that *Morin* had been decided "in a different context." Relying instead on *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004), a case "in precisely the same context," Slip op. at 7, the majority found that filing a naturalization application did not establish Mr. Daly as a "national" of the United States, under INA § 101(a)(22)(B). However, Judge Duncan dissented, emphasizing the discountenance of contextual distinction in construing statutory language, by this Court, and opined that *Morin*, was applicable until "overruled by statutory amendment, the Supreme Court or the Fourth Circuit sitting en banc." *Id.* at 21. The Fourth Circuit further held the BIA's consultation of Mr. Daly's Application for Statement of Charges/Statement of Probable Cause was consistent with *Kirksey*, which employed the "categorical approach" in the determination of whether a prior conviction constituted a crime of violence. The Fourth Circuit reasoned that Mr. Daly's Application for Statement of Charges/ Statement of Probable Cause, which was incorporated by

reference as a record of conviction, "could be consulted to determine whether [Mr. Daly's] *conduct* constituted a crime of violence." Slip op. at 18. *Emphasis added.* The Fourth Circuit's ruling sanctioning the fact finding inquiry to make a determination as to whether Mr. Daly's conduct would suffice as a crime of violence, is inconsistent with *Taylor v. United States*, 495 U.S. 575 (1990), and as reiterated more recently in *U.S. v. Shepard*, 125 S.Ct. 1254 (2005).

REASONS FOR GRANTING THIS PETITION

The Fourth Circuit has dramatically departed from its earlier interpretation, in *Morin v. United States*, that a naturalization application "is the most compelling evidence of allegiance to the United States," as "a national of the United States," under 8 U.S.C. § 1101(a)(22). The majority reasoned that an application for naturalization does not establish nationality where "a person's nationality status determines whether he can enjoy the rights and benefits of United States nationality and avoid deportation." Slip op. at 7, n.3. The majority used the Ninth Circuit's decision in *Perdomo-Padilla* to arrive at its conclusion that Mr. Daly is not a "national" under section 1101(a)(22). Yet this case does not differ from *Morin*. Both involved the interpretation of "national" under INA § 101(a)(22), 8 U.S.C. § 1101(a)(22). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The Fourth Circuit's decision presents an issue of immense judicial concern. First, this Court

does not countenance the use of contextual distinction in interpreting statutory language of the court's decision. The right to notice precludes the linguistic anarchy inherent in construing statutory language to mean one thing here and the opposite elsewhere, based on factors not readily apparent on the face of the statute. Second, this Court precludes the radical departure from settled law but rather respects principles of *stare decisis*,[5] which weigh heavily against a court overruling itself. Third, the adoption of *Perdomo-Padilla* has brought the Fourth Circuit into conflict with itself. Yet *Morin,* as the earlier Fourth Circuit decision controls, under the Fourth Circuit elaborate rules of intra-circuit conflict enunciated in *McMellon v. United States,* 387 F.3d 329, 332 (4th Cir. 2003). "[A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions." Thus it would appear the scope and breadth of this decision is limited and applicable to only Mr. Daly, a result this Court does not countenance.

But the most important reason to grant this application is that the Fourth Circuit's decision to "consult[]" Mr. Daly's Application for Statement of Charges/Statement of Probable Cause runs afoul of this Court's limitation in

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[5] "The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." William M. Lile et al., *Brief Making and the Use of Law Books*, 321 (3d ed. 1914).

Taylor, where this Court held that a court must apply a "categorical" approach in its determination as to whether a prior conviction qualifies for sentencing enhancement purposes "look[ing] only to the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 601. A conviction does not qualify, if it cannot be determined from the statute of conviction that the elements were necessarily adjudicated. More recently in *Shepherd*,[6] the Court reiterated that, in a pleaded case a court may only review items from the record of a prior conviction that were conclusively validated in the earlier proceeding. *Taylor* thus removes adjudication of the required elements for an earlier conviction from the province of a sentencing court, instead allowing only for the determination as to whether that adjudication took place and whether the defendant was convicted of those elements, whether by plea or by jury determination. The inquiry continues to be solely a question of law.

The immigration judge, the BIA, and now the Fourth Circuit's insistence on "consult[ing]" Mr. Daly's Application for Statement of Charges/Statement of Probable Cause, to determine whether Mr. Daly's conduct could constitute a violent version of his prior conviction, results from a misapplication of *Taylor*. The Fourth Circuit finds support for its decision in the sweeping statement that "other courts of appeals have held that a judge may look beyond the definition of the crime to determine whether an alien committed a crime of violence." Slip op. at 16. But none of the cases the Fourth Circuit cite stand for the blanket

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[6] Subsequent to filing the appeal in the Fourth Circuit, but prior to the Fourth Circuit decision, this Court handed down the opinion in *Shepherd*.

proposition that a court may conduct factual assessments of a defendant's underlying conduct in order to draw inferences about the qualifying status of those convictions. Each of these holdings is erroneous. Each is in considerable tension with a principle of plain-error review established by this Court. See also, *United States v. Sanford*, 404 F.3d 834 (4th Cir. 2004) (where the Fourth Circuit rejected extra-indictment facts relied on by a sentencing court because its conclusion that the prior offense was a "crime of violence" was not necessarily determined in the earlier proceeding). Indeed such a factual inquiry would ignore the dictates of *Taylor* and more recently *Shepherd*, which limit the scope of judicial fact-finding. The Fourth Circuit in an unjustifiable expansion of the role of the judiciary in reviewing prior convictions, goes well beyond the fact of a prior conviction, and instead expressly examines a judicial document in order to make an assessment, long after the fact, of whether a prior conviction was a violent version of the misdemeanor, for which a guilty plea was entered. The Fourth Circuit has sanctioned an impermissible factual inquiry in direct contravention of *Taylor*. The Fourth Circuit's decision thus warrants a review.

Moreover, Mr. Daly's violation of Md. Art. 27, Sec. 35(b)(1), which involved an unfortunate and regrettable event for which Mr. Daly admitted guilt, and has served time, does not qualify as a crime of violence under 18 U.S.C. § 16. Both § 16(a) and 16(b) require the "use[]" of "physical force" for a conviction, to qualify as a "crime of violence," *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA April 4, 2002) (en banc). This Court has instructed that section 16 "requires [courts] to look to the elements and the nature of the offense of conviction." *Leocal v. Ashcroft*, 125

S.Ct. 377, 381 (2004). Maryland common law battery does not have as an element of the application of physical force against another, and thus, is not a "crime of violence." See also, *United States v. Kirksey*, 138 F.3d 120 (4th Cir. 1998), (Maryland common law battery is not categorically a "crime of violence"). The Fourth Circuit's decision to not look at the elements of the offense, rather than particular facts of Mr. Daly's crime has resulted in the erroneous resolution that Mr. Daly's conviction for Maryland common law battery qualifies as a "crime of violence," under 18 U.S.C. § 16. This warrants a review.

The Fourth Circuit's interpretation of 8 U.S.C. § 1101(a)(22), and the Fourth Circuit's decision affirming the BIA's removal order against Mr. Daly would work an immense hardship and injustice on Mr. Daly, who as a veteran, is entitled to all perquisites and benefits accruing therefrom including, but not limited to, access to quality health care, educational opportunities and access to home mortgage loans. Mr. Daly will lose all upon removal from the United States. Vacating the Fourth Circuit's decision will allow Mr. Daly to retain all these rights, and continue his life in the United States.

A. THE FOURTH CIRCUIT IS BOUND BY ITS EARLIER HOLDING IN *MORIN*

Despite a strong national policy in favor of uniform application of the immigration laws, whether an alien is a "national" of the United States, under INA section 101(a)(22), and thus, not removable, varies dramatically among the circuits. The different approaches with circuits in interpreting the phrase "*owes permanent allegiance to the United States,*" under INA § 101(a)(22)(B) (emphasis

added), contributes to the lack of uniformity. The result is the disparate treatment of aliens among the courts, with the location of the removal proceeding determining the ultimate outcome. A stark example of the disparate treatment is presented by *Morin*, where the Fourth Circuit found that a naturalization application was the "most compelling evidence of permanent allegiance to the United States," 80 F.3d at 126, by a permanent resident alien, and the present case where the Fourth Circuit relying on *Perdomo-Padilla*, announced, in one conclusory statement contained in a footnote, that the same application for naturalization would not suffice to establish that a permanent resident alien "owes permanent allegiance to the United States," for purposes of "whether he can enjoy the rights and benefits of United States nationality and avoid deportation." Slip op. at 7, n.3. This decision further frustrates and reinforces the lack of immigration law uniformity in a rather dramatic fashion. The court of appeals' decision is a striking departure from this Court's jurisprudence. Because, "*stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification. *E.g., United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996). The court of appeals erred in overlooking these decisive considerations.

1. The majority's rationale for brushing aside its earlier interpretation of INA § 101(a)(22), was that *Morin* "concerned the reach of a federal murder statute" while Mr. Daly's case concerned "whether he [could] enjoy the rights and benefits of United States nationality and avoid deportation." Slip op. at 7 n.3. But "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable and consistent development of legal principles,

fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). See also, *Paterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."). These considerations apply with equal force here. Nearly ten years have passed since the Fourth Circuit holding in *Morin*, thus, enhancing the usual precedential force because Congress has taken no action to modify INA § 101(a)(22) and order that it does not allow naturalization application as establishing nationality. Moreover, the right to notice precludes the linguistic anarchy inherent in construing statutory language to mean one thing here and the opposite elsewhere, based on factors not readily apparent on the face of the statute. As Justice Duncan in dissenting, from that portion of the opinion, emphasized that "I do not agree that the existence of 'different contexts' gives us license to interpret the exact language in the same statute differently in different cases." (Duncan, J., dissenting). The decision of the Fourth Circuit below disregards more than the Court's reasoning on principles of *stare decisis* and statutory construction. *United States v. Louisiana*, 394 U.S. 11, 34 (1969). ("It would be an extraordinary principle of construction that would authorize or permit a court to find in the same statute wholly different meanings in different cases."). For if the majority is correct then its earlier holding in *Morin* has been rendered incomprehensible. According to the majority, the same application for naturalization, which suffices to establish nationality for purposes of 18 U.S.C. § 2332(a), makes Mr. Daly a "national" of the

United States, under 18 U.S.C. § 2332(a) but not a "national" for purposes of INA § 237(a)(2)(A)(iii).

a. Neither the Constitution nor any prior judicial decision supports the "rights and benefits" delineation criteria supplied by the Fourth Circuit. Lawful permanent resident aliens are the most favored category of aliens admitted to the United States. They have the most ties to the United States of any category of aliens. Most are admitted because of family members present in the United States, who are either United States citizens or, other lawful permanent resident aliens. INA § 203(a), 8 U.S.C. § 1153(a). Lawful permanent resident aliens have the right to apply for United States citizenship, the right, without limitation, to work in the United States, and the right to reside permanently in the United States. This Court has articulated that non-citizens acquire an "ascending scale of rights as [they] increase [their] identity with our society" *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). See also, *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("Once an alien gains admission to our country and begins the ties that go with permanent residence, his constitutional status changes accordingly."). But of particular relevance, in the case below, is that this Court reaffirmed the principle that aliens, lawful permanent residents or otherwise, are entitled to protection under the Due Process Clause in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Both *Morin* and Mr. Daly therefore, are on equal footing, and the Fourth Circuit's supplied rationale merely does violence to INA § 101(a)(22). This Court must instruct that the Fourth Circuit was not at liberty to supply the rights and benefit criteria – or any other criterion for that matter – as the basis for rejecting *Morin*.

2. It is axiomatic that one three-judge panel of a court cannot ordinarily reconsider or overrule the decision of a prior panel directly on point. *Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir. 2003). See also, *Santamaria v. Horsley*, 110 F.3d 1352, 1355 (9th Cir. 1997), *cert. denied*, 525 U.S. 823-24 (1998). Not only is the majority opinion below at odds with *Morin*, it has created an intra-circuit conflict which will always be resolved in favor of *Morin*, as the earlier adopted decision. In the Fourth Circuit, "when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court," *McMellon v. United States*, 387 F.3d 329, 323-33 (4th Cir. 2004) (en banc), *cert. denied*, 125 S.Ct. 1828 (2005).

a. Moreover, other courts have adopted the Fourth Circuit's reasoning in *Morin* to arrive at the same conclusion that a naturalization application suffices to establish a permanent resident alien as a "national" of the United States. In *Lee v. Ashcroft*, 216 F.Supp. 2d 51 (EDNY 2002), for example, the court held that a permanent resident alien had demonstrated allegiance to the United States and thus, was a national by virtue of a naturalization application and selective service registration. Similarly, the Fifth Circuit followed this reasoning in *Alwan v. Ashcroft*, 388 F.3d 507, 513 (5th Cir. 2004). The majority opinion provides conflicting guidance to other circuits and lower courts, and fosters disparate dispositions of similar cases. Due to the precedential nature of these cases in other circuits, the majority was not at liberty to reject the earlier holding in *Morin*.

B. *TAYLOR* APPLIES TO THIS CASE AND THE CATEGORICAL APPROACH MANDATED IN THAT OPINION REQUIRES REVERSAL OF THE FOURTH CIRCUIT

The Fourth Circuit's opinion reflects a significant and untenable departure from this Court's ruling in *Taylor* as more recently reiterated in *Shepherd*. *Taylor* plainly set forth the "categorical" approach that refers courts to prior convictions and the elements of the crime for which the defendant had been convicted, and precludes a court from making a factual assessment of underlying conduct in order to draw inferences about the qualifying status of a prior conviction. *Taylor* also made no parallel provision for guilty pleas because it rejected fact finding. Standards for determining whether evidence could be considered would have to be established. A fact finding method would suffer from the myriad problems associated with old, stale evidence. *United States v. Sherbondy,* 865 F.2d 996, 1008 & n.6 (9th Cir. 1993). Questions concerning the scope of permissible defenses would have to be resolved. In guilty plea cases, the problem of abbreviated and incomplete factual records would present persistent problems. "[I]n cases where the defendant pleaded guilty there often is no record of the underlying facts." *Taylor*, 495 U.S. at 601. Then in *Shepherd* this Court found the "right analogs for applying the *Taylor* rule to pleaded cases," 125 S.Ct. 1259, and held that a court's inquiry in a pleaded case was limited to the "terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." 125 S.Ct. 1263.

The Fourth Circuit has misapplied *Taylor's* categorical approach, and has also, sanctioned the BIA's search for facts in Mr. Daly's Application for Statement of Charges/ Statement of Probable Cause that would permit a reconfiguration of Mr. Daly's convictions for Maryland common law battery into a "crime of violence." As justification for the fact-finding, the Fourth Circuit reasoned that Mr. Daly's Application for Statement of Charges/Statement of Probable Cause was incorporated into Mr. Daly's charging papers, and that Mr. Daly was convicted of an offense that is not categorically a crime of violence. The Fourth Circuit's conclusion also rests on the erroneous assumption that Mr. Daly pleaded guilty to these factual allegations. The facts upon which the Fourth Circuit relied were neither adjudicated nor necessary to Mr. Daly's prior guilty pleas. Physical force is not an element of Maryland common law battery. Any touch, slight or intentional is a battery. *State v. Duckett*, 306 Md. 503, 510 (Md. 1986). Additionally, a guilty plea is an admission of only the formal elements of the crime charged and not an admission of allegations that do not rise to the level of elements. *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998). Moreover, the Application of Charges/Statement of Probable Cause contained factual allegations for the four offenses Mr. Daly was ultimately charged with and thus, was much broader than the crimes for which he entered the guilty plea. At the bottom, the Fourth Circuit's inquiry was focused on Mr. Daly's conduct and not on the elements that were necessarily adjudicated. The Fourth Circuit's reliance on Mr. Daly's guilty plea to common law battery as the basis of establishing the degree of physical force, under 18 U.S.C. § 16, is an upside down inquiry that this Court has wholly prohibited in *Taylor*.

1. The Fourth Circuit's rationale, for "consult[ing]" Mr. Daly's Application for Statement of Charges/Statement of Probable Cause, flows entirely from an erroneous premise: namely that *Kirksey*, the Fourth Circuit decision in which the "categorical" approach had earlier been employed, squarely applied in this case. But in a pleaded case the categorical approach limits a court by allowing only for the examination of the judicial record such as the charging documents, written plea agreement, transcript of plea colloquy or "any explicit factual finding by the trial judge to which the defendant assented." *Shepherd*, 125 S.Ct. at 1257. The Fourth Circuit has thus, mistaken the categorical approach as calling for a determination of not whether the qualifying elements of common law battery were in fact adjudicated, but whether there were facts of Mr. Daly's conduct somewhere present in the record that would permit the reconfiguration of the prior conviction into a crime of violence. For this reconfiguration, the Fourth Circuit employed Mr. Daly's Application for Statement of Charges/Statement of Probable Cause, which contained factual allegations for offenses much broader than the offenses for which he entered the guilty plea. In so doing, it did not matter to the Fourth Circuit that *Shepherd* explicitly limits the scope of judicial fact-finding in pleaded cases. First, it did not matter to the Fourth Circuit that the facts in the Application for Statement of Charges/Statement of Probable Cause were not adjudicated in the state court, and which in any event were not necessary to prove the offense of Maryland common law battery. Second, it did not matter to the Fourth Circuit that throughout these proceedings, Mr. Daly has consistently stated that his "plea of not guilty to an agreed statement of facts" was not an admission of guilt to the factual allegations in the Application of Statement of

Charges/Statement of Probable Cause. Yet a guilty plea constitutes an admission only to the elements set out in the charging document and does not necessarily constitute an admission to extraneous facts recited there in. *United States v. Thomas*, 355 F.3d 1191, 1199 (9th Cir. 2004); see also, *United States v. Broce*, 488 U.S. 563, 569 (1989) (a defendant who pleads guilty admits "all the factual and legal elements necessary to sustain a binding, final judgement of guilt and a lawful sentence.").

Third, the Fourth Circuit's imagined meeting of the minds in Mr. Daly's plea is contradicted by actual experience in courts. As Justice Scalia pointed in his dissent in *United States v. Bousley*, 523 U.S. 614 (1998), the factual implication of guilty plea admissions will depend on the legal issues being addressed. A defendant's plea to "knowingly and intentionally us[ing] . . . firearms during and in relation to drug trafficking" meant mere possession of a firearm in the vicinity of the drug offense before this Court's ruling in *Bailey v. United States*, 516 U.S. 137, 144 (1995), but connoted active employment of the firearm after that decision. A guilty plea to the former does not imply an admission of the latter: "the factual basis [of a plea] will not include a fact which, by hypothesis, the court and the parties think irrelevant. *Bousley*, 523 U.S. at 631 n.* (Scalia, J., dissenting). So too here, the record is silent as to the element of common law battery, there being no plea agreement or recorded plea colloquy to show what Mr. Daly admitted. In the absence of an explicit admission at the plea colloquy, Mr. Daly's guilty plea to battery did not encompass those factual allegations, which evidently do not rise to the level of the elements of common law battery.

Fourth, the Fourth Circuit "[i]n assessing the scope of the facts established" by Mr. Daly's guilty plea was

required to "look at what [Mr. Daly] actually agreed to – that is, what was actually established beyond a reasonable doubt." *United States v. Banuelos*, 322 F.3d 700, 707 (9th Cir. 2003). No sufficiently reliable evidence exists as to what the plea colloquy determined or what documents exactly were cited at the plea colloquy. It is instructive that in the entire course of these proceedings, government has failed to produce the transcripts of the plea colloquy. Thus, in the end, the government produced no evidence of actual admissions of these factual allegations.[7] But all that mattered to the Fourth Circuit was that the documents used as basis for the fact finding were not unreliable. For in reaching its decision, the Fourth Circuit reasoned that the Application for Statement of Charges/Statement of Probable Cause was completed by "[t]he complaining witness [who] was the police officer who responded to a call from Daly's children's school about physical child abuse." Slip op. at 18. As in *Taylor*, the Fourth Circuit hinges its decision on "facts [not] necessarily decided by [Petitioner's] prior conviction." As in *Shepherd*, the Fourth Circuit hinges its decision on neither a judicial record nor an "explicit factual finding by the trial judge to which the defendant assented." *Id.* at 1257. The Fourth Circuit's decisions, which lost sight of all of the implications of "consult[ing]" Mr. Daly's Application of Statement for Charges/Statement of Probable Cause, distorts *Taylor*. This holding has recurring importance to the federal criminal justice system because of its potential effect on

[7] And yet, "[t]he government has the burden at the plea colloquy to seek an explicit admission of any unlawful conduct which it seeks to attribute to the defendant." *Thomas*, 355 F.3d at 1199 (internal citations omitted).

the large number of appeals of convictions obtained by guilty plea. This Court should grant certiorari to review this aspect of the Fourth Circuit's decision.

C. MARYLAND COMMON LAW BATTERY IS NOT A "CRIME OF VIOLENCE"

The Fourth Circuit also significantly erred in concluding that Maryland common law battery is a "crime of violence." In Maryland, at the time of Mr. Daly's conviction, battery was a common law offense, the penalty for which was not statutorily prescribed, and encompassed a wide range of offenses including, "kissing without consent, touching or tapping, jostling, and throwing water upon another." *Epps v. State*, 333 Md. 121, 127 (1993); rudely seizing a person's clothes; L. Hochheimer, *The Law of Crimes and Criminal Procedure* § 253 (2d ed. 1904); cutting off a person's hair, *Id.*; or throwing food at another, *D.C. v. State*, 436 So.2d 203 (Fla. App. 1 Dist. 1983); see also, *Lamb v. State*, 93 Md. App. 422, 613 A.2d 402, 413 (Md. Ct. Spec. App. 1992) (explaining that battery may include an indirect use of force against the body of another, such as setting a dog to attack or exposing a person to inclement weather). Battery (now codified) also includes the severe or unlawful beating of a person, *Kellum v. State*, 223 Md. 80, 85, 162 A.2d 473, 476 (1959); and the fatal shooting or stabbing of a victim. In short, battery embraces "any unlawful application of force, direct or indirect to the body of the victim," *United States v. Coleman*, 158 F.3d 199, 201 (4th Cir. 1998) (internal citations omitted). Further, although intent is an element of the crime of battery, the intent need only be for the touching itself; there is no requirement of intent to cause a specific injury. 6A C.J.S. Assault and Battery, § 71.

1. Understandably courts have reached the conclusion that Maryland common law battery does not qualify categorically as a "crime of violence." "[I]t is unclear whether Maryland common-law assault is a crime of violence per se." *Kirksey*, 138 F.3d at 125. And instead have adopted a comparison approach within the provision of one of the Sentencing Guidelines, U.S.S.G. § 4B1.2(1),[8] which provides for enhancement if the defendant has been convicted of a "crime of violence." Conduct involved in Maryland common law battery may not necessarily involve the "use of physical force against the person of another to the degree required to constitute a crime of violence as used in U.S.S.G. § 4B1.2(1)(i)." *Kirksey*, 138 F.3d at 125. Further, even though the "language of the Sentencing Guidelines does not qualify the degree of 'physical force' that constitutes a crime of violence," *Id.*, the language of U.S.S.G. § 4B1.2(a)(1) is almost identical to § 16(a) while the second part of the guideline differs substantively from § 16(b). Section 16(a) requires that an offense must have "as an element the use . . . of physical force against the person or property of another." The plain meaning of § 16(a) establishes that a crime of violence requires more than the accidental or negligent application of force against another.

2. Section 16(a) is "narrowly drawn to include only crimes whose elements require the use, attempted use or threatened use of physical force." *Francis v. Reno*, 269 F.3d

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[8] Prior to November 1, 1989, the guideline and § 16 were identical because the guideline simply incorporated by reference the definition of "crime of violence" in § 16. United States Sentencing Commission, *Guidelines Manual* § 4B1.2(1) (1988). The guideline was amended effective November 1, 1989 to provide its own definition. U.S.S.G. § 4B1.2(1) (1989).

162, 168 (3d Cir. 2001). See also, *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546-47 (11th Cir. 1990) (analysis of a crime under § 16(a) is a legal rather than a factual inquiry which should focus on the statute that defines the offense rather than the particular conduct of the defendant). Section 16(b) requires that an offense "involve[] a substantial risk that physical force against the person or property of another may be used . . . " By its terms, § 16(b) may apply to a broader range of conduct than § 16(a).[9] Language of section 16(b) and U.S.S.G. § 4B1.2(a)(1) are not analogous. The guideline provides, in pertinent part that: "[t]he term 'crime of violence' means any offense that otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a). Whereas § 16(b) only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will intentionally employ "physical force against the person or property of another." Various courts have noted the important distinction between § 16(b) and U.S.S.G. § 4B1.2(a)(2). See, *e.g.*, *United States v. Parson*, 955 F.2d 858, 864-66 (3d Cir. 1992) (interpreting U.S.S.G. § 4B1.2 and contrasting its "risk of injury" language with, among other things, § 16(b)'s "risk of physical force" language); *Jobson v. Ashcroft*, 326 F.3d 367, 374 (2d Cir. 2003) (second degree manslaughter for recklessly causing the death of another is not a crime of violence under § 16(b)). Both subsections, however, contain the same language that is critical to determining whether offenses

[9] The broader applicability of § 16(b) stems, in large part, from the fact that the "use of physical force" must be "an element" of an offense to qualify under § 16(a), whereas § 16(b) only requires that the offense, "by its nature, involves a substantial risk" that "physical force . . . may be used in the course of committing the offense."

that involve the unintentional or accidental application of force against another qualify as "crimes of violence."

a. Both § 16(a) and § 16(b) require the "use[]" of "physical force" for a conviction to qualify as a "crime of violence" and this Court has made it clear that § 16 "requires [courts] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 125 S.Ct. 377, 381 (2004). The elements of a crime are "those constituent parts of a crime that must be proved by the prosecution to sustain a conviction." *Black's Law Dictionary* 520 (6th ed. 1990). *Chrzanoski v. Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003) ("An element of a crime is a fact that must be proven beyond a reasonable doubt to obtain a conviction."). Thus, the use of physical force against the person or property of another is an element of the offense if it is legally required in order to obtain a conviction.

b. Maryland common law battery does not have as an element a requirement that physical force be "used against the person of another." Maryland common law battery makes clear that the "use . . . of physical force against the person or property of another" is not an element of the offense. Similarly, Maryland common law battery does not have as an element that the defendant's conduct "involve a substantial risk that physical force against the person or property of another may be used," and as such does not qualify as a "crime of violence," under 18 U.S.C. § 16. The Fourth Circuit has considered Mr. Daly's conduct in a particular case, rather than the elements of an offense, which is the minimum that must be proved to support a conviction. The Fourth Circuit's conclusion that common law battery is a crime of violence and therefore, an aggravated felony as defined in, INA

§ 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), further warrants a review.

In our view, Mr. Daly is a "national" of the United States and the Fourth Circuit erred in holding otherwise. The Fourth Circuit also erred in reviewing and relying on factual allegations that were neither decided nor assented to by Mr. Daly in an earlier proceeding for the sole purpose of determining whether Mr. Daly's conviction for common law battery qualified as a "crime of violence."

CONCLUSION

The Petitioner for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1232

LEARIE A. DALY,

Petitioner,

versus

ALBERTO R. GONZALES, Attorney General,

Respondent.

On petition for Review of an Order of the Board of Immigration Appeals. (A-035-751-059)

Argued: February 3, 2005
Decided: May 2, 2005

Before WILKINS, Chief Judge, DUNCAN, Circuit Judge, and James C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Senior Judge Cacheris wrote the majority opinion, in which Chief Judge Wilkins joined. Judge Duncan wrote a dissenting opinion.

ARGUED: MaryRose Ozee Nwadike, Silver Spring, Maryland, for Petitioner. Hillel Ryder Smith, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent. **ON BRIEF:** Peter D. Keisler, Assistant Attorney General, civil Division, Terri J. Scadron, Assistant Director, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

CACHERIS, Senior District Judge:

Learie Arlington Daly, a citizen of Trinidad, petitions for review of a final order of removal based on a 1996 conviction for common law battery in Maryland.

We affirm.

I.

Daly entered the United States from Trinidad on or about December 18, 1976, as a lawful permanent resident at the age of five. While in high school, Daly joined the United States Marine Corps, and formally enlisted upon graduation from high school on July 11, 1989. On September 6, 1993, Daly was honorably discharged from active duty.

On September 30,1996, Daly was arrested on charges that he had beaten his two daughters, ages four and two. On October 4, 1996, Daly was charged with two counts of common law battery and two counts of parental child abuse. On December 17, 1996, Daly pled guilty to two

counts of common law battery in the United States District Court for the District of Maryland and the child abuse charges were dismissed. Daly was sentenced to six years of imprisonment, all of which were suspended, and three years of supervised probation.

On July 22, 1997, Daly was arrested and charged with child abuse, second degree assault and possession of a deadly weapon with intent to injure, and violating his probation. On October 27, 1998, Daly was convicted of violating the terms of his probation and his original six year sentence was imposed.

On May 14, 1999, the Immigration and Naturalization Service ("INS") charged Daly with removeability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 18 U.S.C. § 1101 *et seq.*, as an alien who has been convicted of an aggravated felony, *to wit*, a crime of violence as defined in section 101(a)(43)(F) of the INA. *See* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii). An "aggravated felony" is defined to include "a crime of violence (as defined in 18 U.S.C. § 16) for which the term of imprisonment is at least one year." *Id.* A "crime of violence" is defined to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16.

Between 2001 and 2002, Daly appeared before an immigration judge, who rescheduled his case several times to allow him an opportunity to, *inter alia*, apply for naturalization.[1] On July 9, 2001, the INS denied Daly's application

[1] Pursuant to 8 U.S.C. § 1440(b)(1), an honorably discharged veteran of the United States armed forces may apply for naturalization during deportation proceedings against him.

for naturalization, finding that his aggravated felony conviction precluded him from establishing good moral character.[2] On August 14, 2001, the INS denied Daly's request for a hearing regarding the denial. On February 21, 2002, the United States District Court for the District of Maryland dismissed Daly's petition for review of the denial of his application.

On June 25, 2002, Daly filed a motion to terminate his removal proceedings on the basis that he was a "national" of the United States. On August 1, 2002, the immigration judge denied Daly's motion and ordered him removed to Trinidad. On March 14, 2003, the Board of Immigration Appeals ("the Board") remanded the case for the immigration judge to determine whether Daly was removable as charged. On June 16, 2003, the immigration judge found Daly removable as an aggravated felon and ordered him removed. On February 13, 2004, the Board affirmed the immigration Judge's decision. Daly filed a petition seeking review of the Board's February 13, 2004 ruling.

II.

This Court reviews legal issues determined by the Board to Immigration Appeals de novo. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004) (citations omitted). The Court always has jurisdiction to determine whether the facts relevant to its jurisdiction exist. *Wireko*

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[2] An applicant for naturalization must demonstrate, *inter alia*, that he is "a person of good moral character" for at least five years preceding the filing of his application. *See* 8 U.S.C. § 1427(a). No person shall be regarded as, or found to be, a person of good moral character if he has been convicted of an aggravated felony during the period for which good moral character is required to be shown. 8 U.S.C. § 1101(f)(8).

v. Reno, 211 F.3d 833, 835 (4th Cir. 2000) (citations omitted).

III.

Before reaching the merits of the appeal, we must determine whether we have jurisdiction to consider Daly's argument. Under the INA, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. §1227(a)(2)(A)(iii) (2004). Under section 1252(a)(2)(C) of the INA:

> Not withstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1127(a)(2)(A)(iii) . . . of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C) (2004).

However, the Court has rejected a narrow reading of its role in reviewing final orders of removal under this jurisdiction limiting provision. *See Lewis v. I.N.S.*, 194 F.3d 539, 542 (4th Cir. 1999). Rather, we have jurisdiction to review the two facts which determine whether we have jurisdiction: (1) whether the petitioner is an alien, and (2) whether he is "removable by reason of having committed a criminal offense" listed in section 1252(a)(2)(C). *Id.*

IV.

Daly contests both these facts and argues that: (1) he is not an alien because he is a United States national; and (2) his conviction of two misdemeanor common law battery offenses do not constitute a crime of violence as defined by section 101(a)(43)(F) of the INA and thus do not fit the definition of an aggravated felony. These are the two issues before us.

A.

Section 1101(a)(3) of the INA defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2004). A "national of the United States" is "a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2004).

Daly claims that he is not an alien because he has acquired non-citizen "national" status through objective manifestations of allegiance. He claims to have manifested his allegiance by applying for citizenship, residing in the United States for twenty six years, serving in the U.S. Marine Corps, and taking an oath upon enlisting with the Marine Corps. However, none of these alleged manifestations of allegiance are sufficient to change his status from alien to national of the United States.

1.

This Court has not addressed whether filing an application for naturalization establishes nationality in the immigration context to determine whether a non-United

States citizen may enjoy the rights and benefits of United States nationality. The Court previously held in a different context that filing an application for naturalization does establish nationality.[3]

The Ninth Circuit, however, has addressed the issue in precisely the same context we have in this case, and held that an alien does not become a national of the United States for purposes of exercising nationality rights simply by completing an application for naturalization and giving a statement of allegiance. *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 972 (9th Cir. 2003). The court began its analysis by noting that traditionally, "national of the United States" encompassed only citizens of the United States and non-citizens born in territories of the United States. *Id.* at 968.

The court then considered the text and context of section 1101(a)(22), which defines "national of the United States" as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* The court stated that a "naturalization applicant cannot rightly be said to owe *permanent* allegiance, because naturalization applications are often denied or

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[3] In *Morin v. United States*, 80 F.3d 124, 126 (4th Cir. 1996), the defendant was charged with the murder of "a national of the United States" pursuant to 18 U.S.C. § 2332(a). The defendant tried to escape that offense by alleging that the victim was not a national of the United States. *Id.* The Court ruled that because the victim was a permanent resident alien of the United States who had applied for United States citizenship, he was indeed "a national of the United States." *Id.*

However, *Morin* concerned the reach of a federal murder statute and is not controlling where, as here, a person's nationality status determines whether he can enjoy the rights and benefits of United States nationality and avoid deportation.

withdrawn." *Id.* (emphasis in original). Turning to statutory context, the court noted that section 1101(a)(23) provides that "[t]he term 'naturalization' means the conferring of nationality of a state upon a person *after birth, by any means whatsoever*." *Id.* This provision which immediately follows the definition of a "national of the United States" provides that "naturalization" is the path by which a person attains nationality after birth. Section 1101(a)(23) is thus consistent with the conclusion that one may become a "national of the United States" only through birth or by completing the naturalization process. *Id.*

The court found further support for its interpretation of "national of the United States" in 8 U.S.C. § 1408, which lists four categories of persons who are classified as nationals, but not citizens, of the United States. *Id.* Each category relates in some way to birth in an outlying possession of the United States. Applying the canon of *expressio unius est exclusio alterius*, the court concluded that the fact that Congress has defined "national" as including only those four categories of persons is significant. *Id.* at 969-70 (citing *Boudette v. Barnette,* 923 F.2d 754, 756-57 (9th Cir. 1991)); see also *United States v. Giordano*, 469 F.2d 522, 529 (4th Cir. 1972).

Section 1481 of Title 8, which sets forth a number of ways in which a person who is a national of the United States whether by birth or naturalization, shall lose his nationality," also provided support. 8 U.S.C. § 1481(a). This section implies that a person can become a national of the United States" only through either birth or nationalization. *Perdomo-Padilla*, 333 F.3d at 970.

The court also noted that the Petitioner's interpretation of section 1101(a)(22) could not be reconciled with 8

U.S.C. § 1429, which provides that "no person shall be naturalized against whom there is outstanding a final finding of deportability and no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding." 8 U.S.C. § 1429. Because the INA permits the removal of aliens only, and section 1429 allows the removal of individuals with pending naturalizations, the court concluded that it was clear that Congress viewed applicants for naturalization as aliens and not nationals. *Id.* at 970.

Finally, the court turned to the regulatory context of section 1101(a)(22) and noted that although the INS has not issued regulations defining "national" under section 1101(a)(22), at least one regulation addresses the meaning of "national of the United States" in a different context. *Id.* Title 14 C.F.R. § 1259. 101.(c) defines "national of United States" for the purposes of a NASA grant program as "a citizen of the United States or a native resident of a possession of the United States". It does not refer to or include a citizen of another country who has applied for United States naturalization.

The court then declined to apply *Morin* in the immigration context and ultimately concluded that the only way to become a "national of the United States was through birth or naturalization." *Id.* at 972.

Other courts of appeals have adopted the Ninth Circuit's holding. *See Salim v. Ashcroft*, 350 F.3d 307, 310 (3d Cir. 2003) ("we now join the Court of Appeals for the Ninth Circuit in holding that simply filing an application for naturalization does not prove that one owes a permanent allegiance to the United States'"); *United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003) (adopting the

Ninth's Circuit's analysis and conclusion that "the term 'national,' when used to describe non-citizens, refers only to those born in territories of the United States").

We also find the Ninth Circuit's analysis persuasive and conclude that in the immigration context, an alien does not become a national of the United States simply by completing an application for naturalization and giving a statement of allegiance. In the words of the Ninth Circuit, the "Petitioners interpretation creates an absurd result with respect to those persons whose applications for naturalization are, in fact, denied." *Perdomo Padilla* 333 F.3d at 969. Daly did not attain the status of national of the United States by applying for naturalization.

2.

We also reject Daly's claim that he is a national by virtue of residing for twenty-six years in the United States. The Court joins the other courts of appeals that have held that a person who merely resides for a long period in the United States does not become a national of the United States. *See Oliver v. I.N.S.*, 517 F.2d 426, 427-28 (2d Cir. 1975) (petitioner who resided exclusively in the United States for twenty years since early childhood does not "owe allegiance" and is not a "national"); *Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 638 (8th Cir. 1976); *accord Shekoyan v. Sibley Intern. Corp.*, 217 F. Supp. 2d 59, 66-67 (D.D.C. 2002). A long residency period does not demonstrate the requisite permanent allegiance to the United States. Daly did not become a national of the United States by residing in the United States for twenty-six years.

3.

Daly's claim that he is a United States national because he served in the United States Marine Corps and took the oath upon enlisting also lacks merit. The Ninth Circuit recently held that an alien who has served in the United States armed forces and taken the military oath has not become a national of the United States. *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 938 (9th Cir. 2004). The court explained that its ruling in Perdomo-Padilla that birth and full naturalization are the *only* two ways to attain the status of "national" precluded the petitioner's argument. *Id.* at 940. (emphasis in original). However, the court explained that even if it were free to decide that the petitioner could achieve national status by some act other than full naturalization, it would still conclude that the military oath does not demonstrate that the person taking the oath "owes permanent allegiance to the United States" as required by 8 U.S.C. § 1101(a)(22). *Id.*

We find the Ninth Circuit's analysis in *Reyes-Alcaraz* persuasive and hereby adopt that analysis. Daly did not become a national of the United States by serving in the Marine Corps and taking the oath upon enlisting.

For the foregoing reasons, the Court finds that Daly is an "alien" as defined by the INA.

B.

Daly argues that he is not removable because he has not been convicted of a crime of violence and therefore did not commit an aggravated felony. This argument lacks merit.

Daly argues that the Board erred in looking to the Application for Statement of Charges/Statement of Probable Cause when determining whether battery was a crime of violence. Daly was convicted of common law battery, a crime that is not necessarily a crime of violence. Under Maryland law, a battery is defined as the "unlawful beating of another," and includes "*any* unlawful force used against a person of another, *no matter how slight*," *State v. Duckett*, 510 A.2d 253 (Md. 1986) (emphasis in original). Some courts call crimes like common law battery that sometimes are, and sometimes are not, crimes of violence, divisible crimes. *See, e.g., Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003).

Daly relies on a single sentence in *Lewis v. I.N.S.* to support his position: "We cannot go behind the offense as it was charged to reach our own determination as to whether the underlying facts amount to one of the enumerated crimes" [and thus whether petitioner is removable under INA §242(a)(2)(C), 8 U.S.C. §1252(a)(2)(C)]. 194 F.3d at 543 (citing *Hall v. I.N.S.*, 167 F.3d 852, 855 (4th Cir. 1999)). However, Daly's reliance on *Lewis* is misplaced. In *Lewis*, the petitioner admitted that he had committed an aggravated felony, and the only question before the Court was whether he committed it at a time when it could be a basis for his removal. 194 F.3d at 542-43. Accordingly, the Court could determine this issue by looking solely at INA section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

Daly acknowledges that the Board may review the record of conviction where there is a divisible offense. (*See* Pet'r Br. at 27). However, he argues that under section 240(c)(3)(B) of the INA, 8 U.S.C. § 1229a(c)(3)(B), the record of conviction does not include Maryland's Application for Statement of Charges, which he likens to a police

report. (*Id.*) Yet precedent from this and other courts of appeals indicate that the Application for Statement of Charges is part of the charging document, and thus part of the record of conviction which the Board may consider.

Based on the Court's opinion in *United States v. Kirksey* 138 F.3d 120 (4th Cir. 1998), the Board decided that it could look to the Application for Statement of Charges to determine whether the common law battery was a crime of violence in Daly's case. The issues in Kirksey were: (1) whether assault and battery convictions constitute crimes of violence for purposes of the Sentencing Guidelines; and (2) if they are not crimes of violence, what portions of the state record can be consulted to determine whether they are. *Id.* at 122.

In *Kirksey,* the Court noted that normally a categorical approach is used to determine whether a conviction constitutes a crime of violence. *Id.* at 124. A categorical approach relies only on (1) the fact of conviction and (2) the definition of the prior offense. *Id.* (citations omitted). However:

> where the definition of the prior crime of conviction is ambiguous and will not necessarily provide an answer to whether the prior conviction was a crime of violence, we look beyond the definition of the crime to examine the facts contained in the charging document on which the defendant was convicted.

Id.

Given the definition of battery, it was unclear whether the Court could say categorically that the conduct encompassed in the crime of battery constitutes the use of physical force against the person of another to the degree

required to constitute a crime of violence. *Id.* at 125. The Court then explained that the facts contained in the Application for Statement of Charges/Statement of Probable Cause were incorporated into the charging document, and thus could be consulted to determine whether the conduct constituted a crime of violence. *Id.* at 125-26. Under Maryland law, because a statement of charges is a charging document, it must contain "a concise and definite statement of the essential facts of the offense with which the defendant is charged." *Id.* at 126 (citing Md. Rule 4-202). Two of the charging documents involved in Kirksey's prior convictions began with the clause: "Upon the facts contained in the application of [complaining witness], it is formally charged. . . . " *Kirksey*, 138 F.3d at 126.

The Court explained:

> By incorporating the facts of the complaining witnesses' statements, the charging documents thus comply with Maryland Rule 4-202. Moreover, the facts so incorporated are filed with the charging document, as required by Maryland Rule 4-211. Accordingly, under Maryland procedure, the affidavits of complaining witnesses in these circumstances were not mere testimony providing underlying facts for the issuance of a charging document; they served to supply the facts of the charges as required by Maryland Rule 4-202.

Id.

The Court has also held that where it is unclear from the definition of the crime whether the crime was committed by violent means so as to constitute a violent felony under 18 U.S.C. 924(e)(2)(B)(ii), the sentencing court must examine the charging papers and the jury instructions.

United States v. Cook, 26 F.3d 507, 509 (4th Cir. 1994). Moreover, other courts of appeals have held that a judge may look beyond the definition of the crime to determine whether an alien committed a crime of violence.

The Second Circuit has held that "[i]n reviewing a conviction under a divisible statute, the categorical approach permits reference to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statue that permits removal." *Dickson*, 346 F.3d at 48-49. The court went on to explain that "'the record of conviction' is statutorily defined as including. . . . the charging document. . . . " *Id.* at 53 (citing INA section 240(c)(3)(B), 8 U.S.C. §1229a(c)(3)(B)).

The Ninth Circuit has explained that "[i]f the statute of conviction is not a categorical match because it criminalizes both conduct that does and conduct that does not qualify as an aggravated felony," the court takes a "modified categorical *approach*," and conducts "a limited examination of documents in the 'record of conviction.'" *Ferreira v. Ashcroft*, 390 F.3d 1091, 1095 (9th Cir. 2004). The record of conviction includes the state charging document. *Id.*

Finally, the seventh circuit has noted that "a well established exception allows judges to look beyond the indictment or information when it [i]s otherwise impossible to determine the proper classification of the offense . . . and . . . the deviation d[oes] not require a hearing to resolve contested factual issues." *Xiong v. I.N.S.*, 173 F.3d 601, 605-06 (7th Cir. 1999) (allowing judge to look at the criminal complaint not for the illegitimate purpose of determining what petitioner could or should have been

convicted of, but rather for the legitimate purpose of determining what he had been convicted of).

The Court's reasoning in *Kirksey* applies in this case. Like two of the charging documents involved in Kirksey's prior convictions, the charging documents in Daly's prior conviction states: "Upon the facts contained in the application of [complaining witness], it is formally charged. . . . " J.A. 6. The complaining witness was the police officer who responded to a call from Daly's children's school about physical child abuse. A.R. 821. He filled out the Application for Statement of Charges and signed it under penalties of perjury that the contents of the Application were true to the best of his knowledge, information and belief. *Id.* Based on *Kirksey*, the facts contained in the Application for Statement of Charges/Statement of Probable Cause were incorporated into the charging document, and could be consulted to determine whether the conduct constituted a crime of violence.

The Application reveals that Daly physically struck his four year-old daughter with a belt and buckle resulting in serious facial injury and physically beat his two-year-old daughter so severely that the beating resulted in bruising and marks on her buttocks and thighs. A.R. 821-23; J.A. 240. A "crime of violence" is defined to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §16. The facts contained in the Application clearly show that Daly's underlying conviction was for a crime of violence. We find that the Board did not err in referencing the Application for Statement of Charges/Statement of Probable Cause, and Daly is removable by reason of having committed a crime of violence.

V.

For the reasons set forth above, we affirm the ruling of the Board of Immigration Appeals.

AFFIRMED.

DUNCAN, Circuit Judge, dissenting:

This court has previously held that an application for citizenship suffices to make a permanent resident alien a national of the United States pursuant to 8 U.S.C. § 1101(a)(22). *United States v. Morin*, 80 F.3d 124, 126-27 (4th Cir. 1996). The majority, in holding that Mr. Daly's application for citizenship does not make him a national of the United States pursuant to Section 1101(a)(2), claims that *Morin* occurred in a different context and proceeds to reinterpret the statute. *See* Maj. Op. n.3. I do not agree that the existence of "different contexts" gives us license to interpret the exact language in the same statute differently in different cases.

As the Supreme Court has noted:

> It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases, and it would require a stronger showing of congressional intent than has been made in this case to justify the assumption of such unconfined power.

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 34 (1969); *see also Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 972 (9th Cir. 2003) (refusing to distinguish *Morin* from the immigration context simply because it was a criminal case); *Department of Energy v.*

Westland, 565 F.2d 685, 690 n.6 (C.C.P.A. 1977); *Kehaya v. United States,* 355 F.2d 639, 641 (Ct. Cl. 1966).

While I agree with the majority that *Perdomo-Padilla* presents the better reading of Section 1101(a)(2), I am compelled to follow *Morin* until it is overruled by statutory amendment, the Supreme Court, or the Fourth Circuit sitting en banc. *United States*, 387 F.3d 329, 332-33 (4th Cir. 2004). Under Morin, Mr. Daly is a United States national not subject to 332-33 deportation. Accordingly, I would reverse the final order of removal. I respectfully dissent.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A35 751 059 – Baltimore Date: Feb. 13 2004

In re: LEARIE ARLINGTON *DALY*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: MaryRose Ozee Nwadike, Esquire

ON BEHALF OF DHS: Nelson A. Vargas-Padilla
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Termination of proceedings

This case was last before the Board on January 15, 2004, when we found moot a motion to reconsider filed by the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) requesting reconsideration of the Board's March 14, 2003, decision remanding the record to the Immigration Judge for an express finding of removability. The respondent now appeals the Immigration Judge's June 16, 2003, decision on remand finding him removable as charged and ordering

him removed from the United States. The DHS has renewed its motion for reconsideration of the Board's March 14, 2003, decision. The respondent's appeal will be dismissed, and the DHS' motion for reconsideration is moot.

The record reflects that on December 17, 1996, the respondent was convicted for two counts of the offense of common law battery in the District Court of Maryland for Baltimore County, for which he received a 6-year sentence of incarceration for each offense.[1] On or about May 14, 1999, the DHS served the respondent with a Notice to Appear charging him with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien having been convicted of an aggravated felony as defined in section 101 (a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). On August 2, 2002, the Immigration Judge issued a decision denying the motion to terminate proceedings filed by the respondent and concluding that the respondent is not a "national" of the United States. The respondent appealed this decision to the Board.

On March 14, 2003, the Board remanded the case to the Immigration Judge in order to allow him the opportunity to make specific findings as to the respondent's removability. In his June 16, 2003, decision regarding the respondent's removability, the Immigration Judge sustained

[1] The respondent's 6-year sentence to incarceration was suspended to 3 years supervised probation. Respondent was subsequently arrested and charged with child abuse, second degree assault, possession of a deadly weapon with intent to injure, and violation of probation in July 1997. On October 27, 1998, the respondent was convicted of violating the terms of his probation and the original 6-year sentence was imposed.

the charge under section 237(a)(2)(A)(iii) of the Act concluding that each of the counts in the respondent's 1996 conviction for common law battery in Maryland constituted a conviction for a "crime of violence" under both 18 U.S.C. §§ 16(a) and (b). The respondent again appealed.

On appeal, the respondent now argues that the Immigration Judge erred in finding his common law battery convictions to be "crimes of violence" as defined by section 101(a)(43)(F) of the Act. Specifically, the respondent contends that the Immigration Judge committed legal error in considering the respondents' "Application for Statement of Charges/Statement of Probable Cause" as part of his conviction record in determining whether his convictions qualify as "crimes of violence." *See* Respondent's Brief at 7.

In response, the DHS first argues that the offense of common law battery in Maryland is not a divisible offense as found by the Immigration Judge in his June 13, 2003, decision, and the Board in its March 14, 2003, decision. *See* DHS Brief at 6-9. In this regard, the DHS maintains that the offence of common law battery in Maryland has as an element the use, attempted use, or threatened use of physical force against the person or property of another thus qualifying it as a "crime of violence" under 18 U.S.C. § 16(a). The DHS also argues that even if the offense of common law battery in Maryland is a divisible offense, the record nevertheless demonstrates that the respondent has been convicted of a "crime of violence" in accordance with 18 U.S.C. § 16(b). *See* DHS Brief at 9-10. Finally, the DHS "reasserts" its motion to have the Board reconsider its March 14, 2003 decision arguing that the Board is collaterally estopped from "re-litigating" the issue as to whether the respondent's battery convictions are aggravated felonies

because the United States District Court For the District of Maryland has previously adjudicated the issue in its own February 21, 2001 decision in the respondent's case. *See* DHS Brief at 10-14.

Section 101 (a)(43)(F) of the Act defines the term "aggravated felony," in pertinent part, as "a crime of violence (as defined in section 16 of Title 18, United States Code . . .) for which the term of imprisonment at least one year." Section 16 of Title 18 of the United States Code defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

When a particular offense would cover both conduct that is a "crime of violence" and conduct that is not, the offense is considered "divisible" and it is then necessary to look at the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes a removable offense. *See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999). Generally, charging documents are not admissible to prove a criminal conviction and, thus, are not considered to be part of a "conviction record." *See Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988). They are, therefore, not generally considered in determining whether a particular offense constitutes a "crime of violence." *Id.*

However, the United States Court of Appeals for the Fourth Circuit, in which this case arises, has held that when a definition of a crime is ambiguous and will not necessarily provide the answer as to whether a particular conviction is for a "crime of violence," it is permissible to look beyond the definition of the crime to examine the facts contained in the charging document on which the defendant was convicted. *See United States* v. *Kirksey*, 138 F.3d 120, 124 (4th Cir. 1998) ("In a limited class of cases, . . . when the definition of the . . . crime of conviction is ambiguous and will not necessarily provide an answer to whether the crime was for a crime of violence, we look beyond the definition of the crime to examine the facts contained in the charging document on which the defendant was convicted"); *Taylor* v. *United States*, 495 U.S. 575, 602 (1990) (allowing use of charging documents in narrow range of cases); *see also Xiong* v. *INS*, 173 F.3d 601 (7th Cir. 1999) (holding that a court may look beyond the record to a criminal complaint where it is not possible to determine the proper classification of an offense and where a hearing is not required to resolve contested factual issues).

The offense of battery is a common law crime in Maryland and is, therefore, not defined by statute. The common law offense of battery is defined as the "unlawful beating of another," and includes "*any* unlawful force used against a person of another, *no matter how slight.*" *State* v. *Duckett*, 306 Md. 503, 510 (1986). The common law offense of battery, therefore, embraces a wide range of conduct, including "kissing without consent, touching or tapping, jostling and throwing water upon another." *Epps* v. *State*, 333 Md. 121, 127 (1993). More importantly, it may include even indirect applications of force, which do not involve a physical aspect as required under section 101 (a)(43)(F) of

the Act, such as directing a dog to attack or exposing a helpless person to the inclemency of the weather." *Lamb v. State*, 93 Md.App. 422, 441 (Md.Ct.Spec.App. 1992) (internal quotation marks omitted). In this regard, contrary to the DHS' contentions, the Fourth Circuit has concluded that the offense of common law battery in Maryland is in fact divisible and, further, that the definition of battery in Maryland leaves unclear whether the conduct encompassed in the crime categorically constitutes the use of physical force against the person of another. *See United States v. Kirksey, supra*, at 125.

Moreover, contrary to the respondent's contentions, the Fourth Circuit has concluded that, in light of Maryland procedure, the "Application for Statement of Charges/ Statement of Probable Cause," although not technically considered part of the "conviction record," may nevertheless be used in determining whether a particular battery offense constitutes a "crime of violence." *Id.* In particular, the Fourth Circuit has addressed the respondent's articulated concerns regarding reliability of evidence by noting that because a statement of charges is a charging document under Maryland law, it must contain "a concise and definite statement of the essential facts of the offense with which the defendant is charged." *Id.* (citing Md. Rule 4-202). Coupled with the requirement that the document state the time and place of the offense, Maryland discharges its constitutional duty to advise defendants adequately about the nature of the charges against them and with sufficient particularity so that a disposition may be pled to avoid double jeopardy. *Id.* (citations omitted).

In light of the foregoing, we concur with the Immigration Judge's decision finding that the respondent's

convictions for common law battery in Maryland constitute convictions for "crimes of violence" as defined in section 101(a)(43)(F) of the Act. In particular, the "Application for Statement of Charges/Statement of Probable Cause" reveals that the respondent physically struck his 4-year-old daughter with a belt and buckle resulting in serious facial injury and physically beat his 2-year-old daughter so severely that the beating resulted in bruising and marks on her buttocks and thighs (Exh. 2). As a result, the respondent is removable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act.

Because we concur with the Immigration Judge's decision finding the respondent removable as charged, we find it unnecessary to address the DHS' "reassertion" of its motion to reconsider our March 14, 2003, decision remanding the record to the Immigration Judge. We find that the motion is moot.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
DALY, Learie Arlington	)	CASE: A35-751-059
	)	
RESPONDENT	)	

CHARGE:

Immigration and Nationality Act (INA) § 237(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony as that term is defined under INA § 101(a)(43)(F), a crime of violence for which a sentence of one year or more was imposed.

APPLICATION: Finding of Removability

ON BEHALF OF RESPONDENT
MaryRose Ozee Nwadike, Esq.
8701 Georgia Avenue, Suite 600
Silver Spring, Maryland 20910.

ON BEHALF OF DHS
Nelson A. Vargas-Padilla, Esq.
Assistant District Counsel, DHS
31 Hopkins Plaza, Seventh Floor
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MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a 30-year-old male, native and citizen of Trinidad and Tobago, who was admitted to the United States on December 18, 1976, as a lawful permanent resident (LPR). On October 4, 1996, Respondent was charged in the District Court of Maryland with two counts of common law battery and two counts of parental child abuse. On December 17, 1996, Respondent was convicted on both counts of battery. For these offenses, Respondent was sentenced to six years incarceration, all of which were suspended[1]. Thereafter, on July 22, 1997, Respondent was arrested and charged with child abuse, second degree assault, possession of a deadly weapon with intent to injure, and violation of probation. Subsequently, on October 27, 1998, Respondent was convicted of violating the terms of his probation and the original six-year sentence was imposed.

On May 14, 1999, the Department of Homeland Security (Government), formerly known as the Immigration and Naturalization Service, Served a Notice to Appear (NTA) upon Respondent, alleging that (1) he is not a citizen or national of the United States; (2) he is a native and citizen of Trinidad; (3) he was admitted into the United States at San Juan, Puerto Rico on or about December 18, 1976, as an immigrant; (4) on December 17, 1996, he was convicted in the District Court of Maryland for Baltimore City for two offenses of battery, in violation

[1] Respondent was also sentenced to three years supervised probation, attendance at Parents Anonymous, random urinalysis, and he was prohibited from having any contact with his daughters.

of the Common Law of Maryland; and (5) for each offense, the court imposed a six-year term imprisonment. ***See* Court Exhibit 1**. In addition, Respondent's NTA charged him with removeability pursuant to **INA §§ 237(a)(2)(A)(iii)**, as an alien who has been convicted of an aggravated felony, as that term is defined at **INA §§ 101(A)(43)(f). *See id.*** Respondent admitted allegations two through five. He then denied allegation two, and he denied the charge of removeability.

Multiple hearings were conducted in this case during 2001 and 2002. On August 2, 2002, the Court rendered a decision denying Respondent's motion to terminate the proceedings. Moreover, the Court found that Respondent was not a national of the United States. However, the Court inadvertently failed to make a specific finding as to Respondent's removeability. Respondent subsequently appealed the Court's decision to the Board of Immigration Appeals (Board). On March 14, 2003 the Board remanded the case to the Court, in order for it to make a specific finding on Respondent's charge of removabilty.

III. Statement of Law and Findings of the Court.[2]

The Court has carefully considered the entire record. All evidence and testimony offered by Respondent have been considered, even if not specifically discussed in this decision. Based on the discussion below, the Court finds

[2] As preliminary matter, it should be noted that while Government argues that the court is collaterally estopped from re-litigating this issue based upon the decision of the district court in Daly v. INS, the Court finds this argument unpersuasive. ***See Daly v. INS*, Civ. No. AMD-01-3926 (D.Md. Feb. 21, 2002).** This case was remanded by the Board for the purpose of issuing findings as to Respondent's removeability; therefore, the Court shall comply with the Board's order.

Respondent removable pursuant to **INA §§ 237(a)(2)(A)(iii)**, and orders that he be removed to Trinidad and Tobago.

A. Appropriate Analysis for Determining Whether Common Law Battery Constitutes a Crime of Violence

Respondent was convicted of two counts of common law battery in Maryland[3]. Pursuant to those convictions, the Government has charged him with removability as an aggravated felon. The particular subsection, under which Respondent has been charged, defines aggravated felony as "a crime of violence (as defined in **[18 U.S.C. § 16]**, but not including a purely political offense) for which the term of imprisonment is at least one year." ***See* INA § 101(a)(43)(F).** In turn, **18 U.S.C. § 16** defines a "crime of violence" as:

(a) an offense that has as an *element* the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, *by its nature,* involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. (Emphasis added). Subsection (a) presents such a question because it defines "crime of violence" as an offense that contains, as an *element,* "the use, attempted use, or threatened use of

[3] At the time of Respondent's conviction, battery was only a common law crime in Maryland. Thus, it had not been codified into a statute. However, Maryland case law fully articulates the elements of the offense. ***See United States v. Kirksey,* 138 F.3d 120, 125 (4th Cir. 1998).**

physical force." ***See* 18 U.S.C. § 16(a); *United States v. Aragon*, 983 F.2d 1306, 1311 (4th Cir. 1993); *see also United States v. Thompson*, 891 F.2d 507, 511 (4th Cir. 1989), *cert. denied*, 495 U.S. 922 (1990)** (interpreting "by its nature" as referring to the intrinsic nature of the offense). Likewise, an analysis of subsection (b) requires a categorical approach that looks to the intrinsic nature of the crime, rather than the facts of each individual case. ***See id.* at 1312.** Accordingly, no matter which subsection of **18 U.S.C. § 16** is to be analyzed, this issue is a question of law rather than fact.

B. Common Law Battery is Divisible

Before the Court may determine whether common law battery qualifies as a crime of violence as a matter of law, the elements of the offense must be set forth. Battery is defined under Maryland common law as the "unlawful beating of another," which includes "any unlawful force used again [sic] a person of another, *no matter how slight.*" ***See Maryland v. Duckett*, 510 A.2d 253 (Md. 1986.)** The common law offense, thus, embraces a wide range of conduct, including "kissing without consent, touching or tapping, jostling, and throwing water upon another." ***Epps. v. Maryland*, 634 A. 2d 20 (Md, 1993).** Battery may even include indirect applications of force such as directing a dog to attach [sic] or "exposing a helpless person to inclemency of the weather." ***Lamb v. Maryland*, 613 A. 2d 402 (Md. Ct. Spec.App. 1992).** Accordingly, it is impossible to "categorically" state whether the conduct encompassed in the crime of battery would constitute the use of physical force to degree required for it to qualify as a "crime of violence." Therefore, in order to determine whether Respondents crime is an aggravated felony, the

Court must examine his record of conviction. ***See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999)** (stating where a statue is divisible, the Court must look to the record of conviction to determine the conduct involved); ***see also United States v. Kirksey*, 138 F.3d 120, 125 (4th Cir. 1998).**

Clearly, the Court has the authority to examine parts of the record, including: the judgment, plea, verdict, indictment, information, and sentence. ***See e.g.* 8 C.F.R. § 1003.41; *Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979); *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587, 588 (BIA 1992); *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979).** In Maryland, a "Statement of Charges" is a charging document; and as such, it serves as the functional equivalent of an information or indictment. ***See* MD CR Rule 4-402, 4-211.** Therefore, it is part of the record of conviction and can be evaluated by the Court. In the instant case, Respondent's Statement of Charges does not set forth any facts that would shed light on whether force was used in the commission of his crime. ***See* Statement of Charges**. Instead, all of the facts upon which the Statement of Charges is based is set forth in Respondent's Application for Statement of Charges/Statement of Probable Cause (Application). However, applications are typically considered to be analogous to police reports, which the Court may only consider in matters of discretion. ***See Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988)** (stating that police reports are admissible only for purposes of determining whether an alien merits the discretionary relief requested).

In *Kirksey*, the Fourth Circuit held that were [sic] a Maryland defendant's application is incorporated into his statement of charges, that application can be evaluated for

the purpose of determining whether the individual committed a crime of violence. ***See Kirksey,* 138 F.3d at 126.** The court of appeals decided this because, under Maryland law, a statement of charges must contain "a concise and definite statement of the *essential facts of the offense* with which the defendant is charged."[4] **MD CR Rule 4-202** (emphasis added). In addition, the charging document must also state the *time and place of the offense.* ***See id.*** (emphasis added). Thus, by incorporating the facts of the complaining witness's statement, the charging document complies with the applicable Maryland rule. ***See* MD CR Rule 4-202**[5]. In addition, those procedural requirements, allow Maryland to discharge its constitutional duty to advise defendants adequately about the nature of the charges against them and with sufficient particularity so that a disposition may be pled to avoid double jeopardy. ***See United States v. Smith,* 44 F.3d 1259, 1264; *see also Kirksey,* 138 F.3d at 126**. In the instant case, Respondent's Statement of Charges begins with the clause "*[u]pon the facts* contained in the application of Ensor, Matthew B. [complaining witness], it is formally charges that . . . " ***See* Statement of Charges** (emphasis added). While the document goes on to describe the time and place of the battery, it fails to describe any facts other than those incorporated pursuant to the first sentence. As such, it is clear that Respondent's Application has been incorporated

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[4] The statement of charges must set out these elements due to the fact that it is considered to be a charging document under Maryland law. ***See* MD CR Rule 4-202.**

[5] Respondent's Application, so incorporated, was filed also with the Statement of Charges, as is required by **Maryland Rule 4-211.** ***See* MD CR Rule 4-211.**

into his Statement of Charges and may be evaluated by the Court.

C. Respondent's Conviction was a Crime of Violence

As is clear from the Application, Respondent's offense did involve the use of physical force against his daughters, the victims. Not only did he whip his four-year-old daughter with a belt and buckle, requiring her to obtain stitches for the laceration over her eye; but he also beat his two-year-old daughter causing bruising and marks on her buttocks and thighs. ***See* Application**. Upon examination of these statements, it is clear that no other factual inquiry is required. ***See Kirksey*, 138 F.3d at 126.** Therefore, the Court is able to follow the methodology set forth by the Fourth Circuit for determining whether Respondent's offense is a crime of violence. ***See Aragon*, 983 F.2d at 1311-12.** The factual charges behind Respondent's conviction clearly reveal "the use" of violence against another person. Consequently, it is apparent that Respondent's conviction qualifies as crime of violence under **18 U.S.C. § 16(a);** and, accordingly, qualifies an aggravated felony pursuant to **INA §101(a)(43)(F)**[6]

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[6] The Government also argued that Respondent's conviction would qualify as an aggravated felony under **18 U.S.C. § 16(b).** However, the Court deems it unnecessary to discuss **§ 16(b)** at any great length. While Respondent argues that his conviction would not qualify because it is a misdemeanor, the Court finds this argument to be unsupportable in the light of precedent to the contrary. ***See Elias v. Maryland*, 661 A.2d 702, 709 (Md. 1995)** (stating that in Maryland, battery is a common law misdemeanor); ***Wireko v. Reno*, 211 F. 3d 833, 835 (4th Cir. 2000)** (holding that a conviction need not be labeled as a felony under state law for it to qualify as a felony under federal law); ***Matter***

(Continued on following page)

IV. Conclusion

On the basis of the foregoing, the Court finds Respondent is removable as charged. Respondent's Motion to Terminate must hereby be denied. In addition, the Court shall order Respondent removed to Trinidad and Tobago. An appropriate order is attached.

June 16, 2003
Date.

/s/ John F. Gossart, Jr.
John F. Gossart, Jr.
United States Immigration Judge
Baltimore, Maryland

***of Crammond*, 23 I&N Dec. 9 (BIA 2001)** (stating that in determining whether a state misdemeanor conviction would qualify as a felony for immigration purposes the Court should apply the federal definition of felony, which defines the terms as any conviction for which the maximum term is more than one year); ***see also* 18 U.S.C. § 3559(a)(5)** (defining felony in the federal context). Furthermore, as discussed above, an analysis under either section must be conducted using the categorical approach. Here, it is apparent that, at a minimum, battery poses at least a "substantial risk that physical force" would be used "against the person or property of another." Accordingly, the Court finds Respondent's conviction would qualify as a crime of violence under either **§ 16(a) or § 16(b)**.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
DALY, Learie Arlington	)	
	)	**CASE: A35-751-059**
RESPONDENT	)	

CHARGE: **Immigration and Nationality Act (INA) § 237(a)(2)(A)(iii)**, as an alien who has been convicted of an aggravated felony as that term is defined under INA § 101(a)(43)(F), a crime of violence for which a sentence of one year or more was imposed.

APPLICATION: Finding of Removability

ON BEHALF OF RESPONDENT
MaryRose Ozee Nwadike, Esq.
8701 Georgia Avenue, Suite 600
Silver Spring, Maryland 20910.

ON BEHALF OF DHS
Nelson A. Vargas-Padilla, Esq.
Assistant District Counsel, DHS
31 Hopkins Plaza, Seventh Floor
Baltimore, Maryland 21201

ORDER

It is this 16th day of June 2003, by the United States Immigration Court, sitting at Baltimore, Maryland, ORDERED:

- that Respondent's Motion to Terminate is hereby **DENIED**; and
- that Respondent is ordered **REMOVED** to Trinidad and Tobago.

/s/ John F. Gossart, Jr.
John F. Gossart, Jr.
United States Immigration Judge
Baltimore, Maryland

APPENDIX D

U.S. Department of Justice,
Executive Office for Immigration Review
Falls Church, Virginia 22041 Decision *of the Board* of Immigration Appeals

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File: A35 751 059 – Baltimore Date: March 14 2003

In re: *S-DALY, LEARIE ARLINGTON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nwadike, Mary Rose Ozee

ON BEHALF OF SERVICE: George W. Maugans

The respondent appeals the August 1, 2002, decision of the Immigration Judge that denied his request to terminate proceedings and found that the respondent is not a "national" of the United States. On appeal, the respondent makes two arguments. First, he argues that he is a national of the United States. Second, he asserts that he has not been convicted of a "crime of violence" and is therefore not an aggravated felon as defined in Section 101(a)(43) of the Immigration and Nationality Act (the Act). We will remand the record to the Immigration Judge.

The Immigration and Naturalization Service (the Service) charged the respondent with being subject to removal from the United States based upon his conviction for two counts of common law battery, asserting that the respondent is removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1237(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony at any time after admission into the United States. The Service specifically alleged that the respondent's conviction constitutes an

aggravated felony under section 101(a)(43)(F) of the Act, because it constitutes a crime of violence for which the respondent was sentenced to at least 1 year in prison. The respondent argued below that common law battery in the State of Maryland is a misdemeanor, and as such cannot be an aggravated felony.

From our review of the Immigration Judge's decision, we do not see any treatment of the respondent's argument that he is not an aggravated felon as charged by the Service in the Notice to Appear (Exh. 1, Form 1-862). The Immigration Judge concludes in his decision that the record of conviction that is in evidence in the record supports the charges of removeability *See* I.J. at 2. However, there is nothing in the transcript of the hearings that shows the charge of removability was sustained. In fact, in two consecutive hearings, the Immigration Judge's statements indicate the charges had not been proven yet. *See* Tr. at 5 (where the Immigration Judge informs the respondent of the Service's charges, and states, "if that is true ___"), Tr. at 36 ("we have delayed taking a plea in Mr. Daly's case"), Tr. at 38 ("While we have not made official pronouncements of findings of fact and conclusions of law as to his removability . . .).

Section 101(a)(43)(F) of the Act defines an aggravated felony as including, "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." Title 18 U.S.C. § 16 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person *or* property of another may be used in the course of committing the offense.

The respondent was convicted of common law battery in Maryland, which constitutes the unlawful beating of another, and includes any unlawful force used against the person of another, no matter how slight. *United States v. Kirksey,* 138 F.3d 120, 125 (4th Cir. 1998). The respondent argues that the definition of common law battery in Maryland encompasses offenses that do and do not constitute crimes of violence under 18 U.S.C. § 16. In *Matter of Sweetser,* 22 I&N Dec. 709 (BIA 1999), we held that where a state statute under which an alien has been convicted is divisible, meaning it encompasses offenses that constitute crimes of violence and offenses that do not, it is necessary to look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes an aggravated felony as defined in section 101(a)(43)(F) of the Act. The United States Court of Appeals for the Fourth Circuit, in *United States v. Kirksey, supra,* similarly held that convictions for battery under Maryland law encompass offenses that are and are not crimes of violence, as that term is defined at section 4B1.2 of the United States Sentencing Guidelines. Accordingly, the Fourth Circuit found it proper and necessary to look beyond the definition of a crime, and examine the facts contained in the charging document on which the defendant was convicted to determine whether his conviction

was for a crime of violence. *United States v. Kirksey, supra,* at 124.

Thus, we will remand the record to the Immigration Judge *so* that he can make a finding on whether the respondent's conviction was for a crime of violence. In light of this remand, we reserve judgment on the question of the respondent's nationality.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

/s/ Roger A. Paul
FOR THE BOARD.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	:	**IN REMOVAL PROCEEDINGS**
DALY, Learie Arlington	:	
	:	**Case #A35-751-059**
RESPONDENT	:	

CHARGES: **Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii),** as an alien who at any time after admission has been convicted of an aggravated felony as defined in **INA § 101(a)(43)(F).**

APPLICATIONS: **Termination of Proceedings** as a Noncitizen National of the United States

ON BEHALF OF RESPONDENT:
MaryRose Nwadike, Esq.
8701 Georgia Avenue,
Suite 600
Silver Spring, MD 20910.

ON BEHALF OF INS:
George W. Maugans, Esq.
Assistant District Counsel
31 Hopkins Plaza,
Seventh Floor
Baltimore, MD 21201

MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a 31-year-old male citizen and native of Trinidad. Respondent was admitted to the United States

at San Juan, Puerto Rico, on or about December 18, 1976 as an Immigrant. Respondent was convicted of two offenses of battery on December 17, 1996 in the District Court of Maryland for Baltimore County.

The Immigration and Naturalization Service ("INS") issued a Notice to Appear ("NTA") on May 14, 1999. The NTA alleged 1) that Respondent is not a citizen or national of the United States; 2) that Respondent is a native of Trinidad and a citizen of Trinidad; 3) that Respondent was admitted to the United States at San Juan, Puerto Rico on or about December 18, 1976 as an Immigrant; 4) that Respondent was, on December 17, 1996, convicted in the District Court of Maryland for Baltimore City for two offenses of battery in violation of the Common Law of Maryland; and 5) for each of these offenses, the term of imprisonment imposed was six years. The NTA charges Respondent with removability pursuant to **INA § 237(a)(2)(A)(iii)**, as an alien convicted of an aggravated felony as defined in **INA §101(a)(43)(F)**.

At a Master Calendar Hearing on September 8, 2000, the Court made findings of fact supported by Government Exhibits 1 and 2, Respondent's Immigrant Visa and Record of Conviction, respectively. This evidence, as now received on the record, supports the allegations of fact and charge of removability. Respondent filed an application for naturalization on January 19, 2001. This application was subsequently denied by the INS on July 9, 2001. Respondent then filed Form N-336, Request for Hearing on a Decision in Naturalization Proceedings, with the INS and a petition to hear a *de novo* review of the INS denial for naturalization with the District Court for the District of Maryland ("District Court"). The review panel of the INS also denied Respondent's application for naturalization. On February 21, 2002, the District Court dismissed

Respondent's petition for *de novo* review. On June 25, 2002, Respondent filed a Motion to Terminate Proceedings with the Court, arguing that he is not removable because he is a "national" of the United States.

II. Documentary Evidence

The Court received and accepted the following documents into evidence:

Court Exhibit 1:	Notice to Appear, dated May 14, 1999
Government Exhibit 1:	Copy of Respondent's Form 1-73, United States Immigrant Visa and Alien Registration, dated December 18, 1976
Government Exhibit 2:	Copy of Respondent's Record of Conviction, dated December 18, 1996

III. Position of the Parties

Respondent:

Respondent contends that the INS has presented no competent evidence to support its allegation that Respondent is "not a citizen or national of the United States." Respondent cites **INA § 101(a)(22)(B)**, which defines "national of the United States" as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." Respondent argues that he is a "national" of the United States because he has been a legal permanent resident for over 26 years, he served in the United States Marine Corps during a time of war, he took the oath of allegiance, he received three permanent

physical injuries while in active military service, and he filed and application received three permanent physical injuries while in active military service, and he filed an application for naturalization. Respondent cities ***United States v. Morin*, 80 F.3d 124 (4th Cir. 1996)**, ***Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001)**, and ***Shittu v. Elwood*, 204 F. Supp. 2d 876 (E.D. Pa. 2002)** to support his argument.

INS:

The INS argues that none of the reasons cited by Respondent make him a "national" of the United States and accordingly, Respondent is subject to removal under the INA. The INS contends that an individual can become a "national" only by birth; moreover, that acquisition of nationality is governed by **INA § 308** and not **INA § 101(a)(22)(B)**. The INS asserts that Respondent does not fall into any of the enumerated categories in **INA § 308** and therefore is not a "national" of the United States. The INS relies on ***Matter of Tuitasi*, 15 I. & N. Dec. 102 (B.I.A. 1974)**, ***Oliver v. United States Dept. of Justice*, 517 F.2d 426 (2d Cir. 1975)**, and ***United States v. Sotelo*, 109 F.3d 1446 (9th Cir. 1997)** to support its argument.

IV. Findings of the court

After a review of Board of Immigration Appeals ("BIA") decisions, other federal precedent, and relevant statutes, the court concludes that Respondent is not a "national" of the United States and the removal proceedings should not be terminated. The Court hereby denies Respondent's Motion to Terminate Proceedings for the following reasons.

An alien is defined in INA § 101(a)(3) as "any person not a citizen or national of the United States." The INA defines "national of the United States" as "(A) a citizen of the United States or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." **INA § 101(a)(22)**, but by **INA § 308**[1]. ***Matter of Tuitasi*, 15 I. & N. Dec. 102, 103 (B.I.A. 1974).**

Moreover, the definition of a "national" pursuant to **INA § 101(a)(22)** is satisfied only at birth; if an individual is not a United States national by birth, his or her only option is naturalization, which leads to the status of citizen, and not national, of the United States. ***Id.*; *Oliver v. United States Dep't* of Justice, 517 F.2d 426, 428 (2d Cir. 1975).**

There is no evidence on the record to show that Respondent was born in the United States or its outlying

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[1] **INA § 308** states, "Unless otherwise provided in section 301 [Nationals and Citizens of the United States at Birth] of this title, the following shall be nationals, but not citizens of the United States at birth: 1) a person born in an outlying possession of the United States on or after the date of formal acquisition of such possession; 2) a person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person; 3) a person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; 4) a person born outside the United States and its outlying possessions of parent one of whom is an alien, and the other is a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years."

possessions, or that he falls under the enumerated categories in **INA § 308**. Respondent emphasizes **INA § 101(a)(22)(B)** as statutory support for his argument, focusing on "permanent allegiance to the United States." Respondent relies on his long time permanent residency, service in the United States military and application for naturalization as objective evidence of permanent allegiance to the United States. Respondent cites ***United States v. Morin*, 80 F.3d 124 (4th Cir. 1996)** for the proposition that a permanent resident who had filed an application for naturalization was a "national of the United States.[2]" The Court agrees with Respondent to the extent that this conclusion was reached by the Fourth Circuit in an attempt to assert jurisdiction over the defendant in that case. With proper deference and respect to the Circuit Court, in order to reach this result, the Fourth Circuit interpreted "national" merely in terms of "owing permanent allegiance" without looking to any case law or any other portions of the INA which would have clarified that, as stated in ***Oliver v. United States Dep't of Justice***, "national" status is achieved at birth, not through a mere application for naturalization.

Respondent relies heavily on ***Shittu v. Elwood*, 204 F. Supp. 2d 876 (E.D. Pa. 2002)**, arguing that immigration courts should consider all "objective indicia of permanent allegiance in determining whether a permanent resident who has applied for naturalization is a U.S. 'national.'" ***Shittu*, at 880**. Assuming, *arguendo*, that the status of a United States "national" was based on a permanent resident's objective showing of "permanent allegiance

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[2] **18 U.S.C. § 2332 (2000)**

to the United States," according to the relevant case law, Respondent would not meet such a showing.

First, it is widely held that an individual does not achieve "national" status through lengthy residency in the United States. ***Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001); *Oliver v. United States Dep't of Justice*, 517 F.2d 426, 427 (2d Cir. 1975)**. Second, there is no provision in the INA conferring the status of "national" of the United States to permanent residents who have served in the United States Armed Forces, nor is there any case law that stands for this preposition[3]. Finally, in ***Shittu v. Elwood*,** the court found that the respondent's aggravated felony conviction "objectively demonstrated his lack of allegiance to the United States and its laws." ***Shittu*, 204 F. Supp. 2d at 880.** In ***Shittu***, the respondent's application for permanent residency was pending at the [sic] which was denied on three separate occasions, presumably due to his aggravated felony conviction. Thus, the District Court of Maryland effectively rejected Respondent's petition to become a citizen and national of the United States.

V. Conclusion

Based on the statutory requirements for noncitizen nationals in **INA § 308** and the supporting case law, it is clear that the term "national" was not meant to apply to those individuals who merely claim allegiance to the United States. Respondent's service in the U.S. military

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[3] The Oath of Enlistment taken by United States Marines is not the Oath of Allegiance taken by naturalized citizens. *See;* ***http://www.geocities.com/sweetnena20/usmc/marinesoath.html* 8 C.F.R. § 337.1(a).**

provides no exception. Noncitizen nationals are those who have some link by birth to a United States possession. Respondent can demonstrate "national" status neither by birth or naturalization. As such, his motion is denied. Respondent has exhausted his sole possibility for relief in the form of seeking naturalization and, in the alternative, the status of a United States "national." As Respondent's petition for naturalization has been denied by the INS and the District Court, and this Court has denied Respondent's motion that he is a United States "national," Respondent is found removable as charged. As the Court has found Respondent removable as charged, an appropriate order is attached.

/s/ John F. Gossart, Jr.
John F. Gossart, Jr.
United States Immigration Judge
Baltimore, Maryland

August 1, 2002
Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	:	**IN REMOVAL PROCEEDINGS**
DALY, Learie Arlington	:	
	:	**Case # A 35-751-059**
RESPONDENT	:	
	:	

CHARGES: **Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii)**, as an alien who at any time after admission has been convicted of an aggravated felony as defined in **INA § 101(a)(43)(F).**

APPLICATIONS: **Termination of Proceedings** as a Noncitizen National of the United States.

ON BEHALF OF RESPONDENT:
MaryRose Nwadike, Esq.[4]
8701 Georgia Avenue, Suite 600
Silver Spring, MD 20910.

ON BEHALF OF INS:
George W. Maugans, Esq.
Assistant District Counsel
31 Hopkins Plaza,
Seventh Floor
Baltimore, MD 21201

ORDER

It is thus ordered this **1st** day of **August, 2002**, by the immigration Court, Baltimore, Maryland,

[4] The Court acknowledges with appreciation the pro bono representation of counsel.

ORDERED:

1. that the application for termination of proceedings be **DENIED**; and

2. that Respondent be removed and deported as charged to Trinidad and Tobago.

8-1-02
Date

/s/ John F. Gossart, Jr.
John F. Gossart, Jr.
United States Immigration Judge
Baltimore, Maryland